Supreme Court, U.S.
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No. 91-1674

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA,

Respondent,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO; THE COMMISSION OF LA COSA NOSTRA;

[Defendants continued on inside front cover]

STAR MARKET COMPANY,

Petitioner

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BARBARA J. HILLMAN
Counsel of Record
CORNFIELD AND FELDMAN
343 South Dearborn Street
Thirteenth Floor
Chicago, Illinois 60604
(1-312) 922-2800

Attorneys for Michael H. Holland, Election Officer

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[Defendants continued from front cover]

ANTHONY SALERNO, also known as Fat Tony; MATTHEW IANNIELLO, also known as Matty the Horse; NUNZIO PROVENZANO, also known as Nunzi Pro; ANTHONY CORALLO, also known as Tony Ducks; SALVATOR SANTORO, also known as Tom Mix; CHRISTOPHER FURNARI, SR., also known as Christie Tick; FRANK MANZO, CARMINE PERSICO, also known as Junior, also known as The Snake; GENNARO LANGELLA, also known as Gerry Lang; PHILLIP RASTELLI, also known as Rusty; NICHOLAS MARANGELLO, also known as Nicky Glasses; JOSEPH MASSINO, also known as Joey Messina; ANTHONY FICAROTTA, also known as Figgy; EUGENE BOFFA, SR.; FRANCIS SHEERAN; MILTON ROCKMAN, also known as Maishe; JOHN TRONOLONE, also known as Peanuts; JOSEPH JOHN AIUPPA, also known as Joey O'Brien, also known as Joe Doves, also known as Joey Aiuppa; JOHN PHILLIP CERRONE, also known as Jackie the Lackie, also known as Jackie Cerrone; JOSEPH LOMBARDO, also known as Joey the Clown; ANGELO LAPIETRA, also known as The Nutcracker; FRANK BALISTRIERI, also known as Mr. B; CARL ANGELO DELUNA, also known as Toughy; CARL CIVELLA, also known as Corky; ANTHONY THOMAS CIVELLA, also known as Tony Ripe; GENERAL EXECUTIVE BOARD, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; JACKIE PRESSER, General President; WELDON MATHIS, General Secretary-Treasurer; JOSEPH TREROTOLA, also known as Joe T, First Vice President; ROBERT HOLMES, SR., Second Vice President; WILLIAM J. MCCARTHY, Third Vice President; JOSEPH W. MORGAN, Fourth Vice President; EDWARD M. LAWSON, Fifth Vice President; ARNOLD

WEINMEISTER, Sixth Vice President; JOHN H. CLEVELAND, Seventh Vice President; MAURICE R. SCHURR, Eighth Vice President; DONALD PETERS, Ninth Vice President; WALTER J. SHEA, Tenth Vice President; HAROLD FRIEDMAN, Eleventh Vice President; WALTER J. COX, Twelfth Vice President; DON L. WEST, Thirteenth Vice President; MICHAEL J. RILEY, Fourteenth Vice President; THEODORE COZZA, Fifteenth Vice-President; DANIEL LIGUROTIS, Sixteenth Vice-President; and SALVATOR PROVENZANO, also known as Sammy Pro, former Vice-President,

Defendants

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STAR MARKET COMPANY,

Petitioner

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT OF THE CASE

This petition joins the ranks of the petitions for certiorari from a legion of cases decided by the Court of Appeals for the Second Circuit arising out of the Consent Decree entered on March 14, 1989 seeking to rid the International Brotherhood of Teamsters ("IBT") of its domination by organized crime. The central purpose of that Decree was to insure the fair and open conduct of the 1991 IBT election, as a means of freeing the IBT's governing board from the grip of La Cosa Nostra. *U.S. v. IBT (Yellow Freight)*, 948 F.2d 98, 100 (2d Cir. 1991). Michael H. Holland, a private

attorney, was appointed to supervise that election process as the Election Officer.

Mr. Holland promulgated a comprehensive set of rules to govern the election. These rules, entitled the Rules for the IBT International Union Delegate and Officer Election ("Election Rules"), were approved with some modification by both the District Court and the Court of Appeals, *U.S. v. IBT*, 742 F.Supp. 94 (S.D.N.Y., 1990), *aff'd.* 931 F.2d 177 (2d Cir. 1991). The Election Rules protected the right of IBT members to participate in the Election Process and permitted the Election Officer to respond to conduct which prevented a fair, honest and open election. *See, e.g. U.S. v. IBT*, 776 F.Supp. 144 (S.D.N.Y. 1991).

The 1991 IBT election has now been concluded. The results of the election have been certified and the new officers of the IBT installed.

During the course of the now completed 1991 IBT election, Petitioner Star Market Company ("Star Market") was alleged to have discharged one of its employees, Neal Henderson, because of its animus against him for his participation in the 1991 supervised election. Mr. Henderson personally and successfully sought election as a delegate to the IBT International Union Convention committed to the nomination and election of Ron Carey for General President of the IBT. His candidacy was opposed by William J. McCarthy, the incumbent General President of the IBT and President of Mr. Henderson's Local who supported a different candidate for the IBT presidency. (A. 11, 26, 138).[1]

Star Market was notified of the pendency of the claim against it, advised of the legal bases under which its conduct could be challenged and notified of the procedures for

[1] All references are to the Appendix to the Petition for Writ of Certiorari filed by Star Market.

supplying documentary and other evidence to contest the claim. (A. 16, 140). The Election Officer's decision issued in September, 1991. He found that Star Market had discriminated against Mr. Henderson because of the extent and political content of the activities undertaken by him in accordance with the March 14, 1989 Consent Decree. Mr. Holland refused to defer to a prior arbitration award finding the discharge valid, relying, in part, on documentary evidence antedating the award date. He also cited decisions of this Court finding deferral inapposite when dealing with rights not emanating solely from the labor agreement.

Based on prior decisions of the District Court—as affirmed by the Court of Appeals for the Second Circuit, *U.S. v. IBT*, 907 F.2d 277 (All Writs Order) (1990) and *U.S. v. IBT*, 948 F.2d 100 (Yellow Freight) (1991)—remedial relief against Star Market was found appropriate to prevent it from interfering with the Consent Decree mandate of a free and fair election. Clearly employment discharge, threatened discharge or even the possibility of such discipline of election activists based on their opposition to incumbent union officials effectively forecloses member election participation and accordingly prevents implementation of the Consent Decree.

Star Market appealed the decision of the Election Officer to the Independent Administrator. After hearing, the Independent Administrator in a written decision affirmed. Star Market received a further hearing before the District Court and appealed from that decision to the Court of Appeals for the Second Circuit.

ARGUMENT

I. THE ELECTION IS OVER.

The matters over which Petitioner seeks review arose in the context of the 1991 IBT International Union election and the Election Rules promulgated to govern that election. The election is over; the results have been certified. The next IBT election will occur in 1996.

While the instant cause is concededly not moot, the likelihood of its reoccurrence with respect to the 1991 IBT election is remote. To now determine the details of the 1996 election invites pure speculation. Thus, it is impossible to forecast whether the issues Star Market seeks to have heard—or even the factual matters out of which this cause emanates—will ever again arise.

The decision below of the Court of Appeals does not conflict but is fully in accord with every other decision issued in the context of this historic election. Now that the election is over, this Court's limited time should not be devoted to review of this case.

II. JURISDICTION WAS PROPERLY EXERCISED TO PREVENT STAR MARKET FROM INTERFERING WITH THE CONSENT DECREE.

Star Market although not a party to the Consent Decree had the power and acted to interfere with the implementation of that Decree. The Consent Decree provided for the cleansing of the hideous influence of organized crime from the IBT through election reform and the active participation of rank and file IBT members in the election process. For an IBT member to be subject to discharge—industrial capital punishment—for such participation totally frustrates implementation of the Consent Decree. The chilling effect of allowing such conduct to go unremedied travels far beyond

the member discharged. If election activities and particularly opposition to incumbent Union officers were conceived to create the possibility of loss of livelihood, it is unlikely that many—if any—IBT members would participate in the process. The Consent Decree would become an empty gesture.

This Court has long recognized that the federal courts are not so powerless. This Court has repeatedly held that the All Writs Act, 28 U.S.C. § 1651, empowers a federal court "to issue such commands . . . as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *United States v. New York Telephone Co.*, 434 U.S. 159, 172 (1977). A federal court may issue auxiliary writs to protect its jurisdiction "when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it." *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273 (1942).

That this authority permits jurisdiction to be exercised over entities such as Star Market who are not parties to the original order is beyond dispute. This Court has held that judicial power under the All Writs Act:

> extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice . . . and encompass even those who have not taken any affirmative action to hinder justice.

New York Telephone, 434 U.S. at 174 (citations omitted); *accord Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 863 (2d Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989). The All Writs Act is to be applied "flexibly in conformity with these principles." *New York Telephone*, 434 U.S. at 173. Indeed, use of the auxiliary writ power is particularly

appropriate in institutional reform litigation, where consent decrees often require "a degree of flexibility in enforcement" in order "to meet evolving conditions." *New York State Association for Retarded Children, Inc. v. Carey*, 596 F.2d 27, 37 (2d Cir. 1978), *cert. denied*, 444 U.S. 836 (1979).

In this unique context—an historic union election supervised under a consent decree and conducted under court-approved rules—the All Writs Act plainly provides the necessary authority to prevent employers from frustrating IBT members' exercise of their right to participate free from unlawful retaliation. This Court has not hesitated to exercise jurisdiction to prevent non-parties from interfering with the implementation of lawful court orders. This case is no different. The District Court properly exercised jurisdiction over Star Market when it interfered with the IBT membership's right to a free and fair election, a right which, by necessity, had to be preserved in order to achieve the Consent Decree's objectives.

III. STAR MARKET WAS AFFORDED FULL PROCESS.

The linchpin of Star Market's claim that it was denied due process is its assertion that it received no notice of the proceedings against it. (Petitioner's Brief at 10, 14-15) Yet the documentary record demonstrates the contrary and the factual findings of not only the Independent Administrator (A. 140) but of both the District Court (A. 34) and the Court of Appeals (A. 16) so hold. Writs of certiorari do not issue to review findings of fact.

Further, and assuming that the Election Officer and Independent Administrator were state actors,[2] Star Market

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[2] The Election Officer does not concede that he or the Independent Administrator are state actors in the constitutional sense, a

was fully afforded appropriate process. Due process does not require strict adherence to codes of evidence and procedure that are reserved for formal trials. This Court has consistently emphasized the flexibility of due process, noting that its fundamental requirement is "the opportunity to be heard 'at a meaningful time and in a meaningful manner'." *Mathews v. Eldrige*, 424 U.S. 319, 333 (1976) (citation omitted); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("due process is flexible and calls for such procedural protections as the particular situation demands"). *See also Lyeth v. Chrysler Corp.*, 929 F.2d 891, 895 (2d Cir. 1991) (due process does not guarantee any particular form of procedure).

Star Market undeniably had an opportunity to be heard before the Election Office, the Independent Administrator, the District Court and the Court of Appeals. As found by the Independent Administrator, the District Court and the Court of Appeals, it was provided notice of the allegations against it and given more than three months to prepare and submit its case. The Election Officer carefully considered the merits of the protest and rendered a detailed written decision. Star Market availed itself of the opportunity to

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necessary prerequisite to Star Market's entitlement to due process. *Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982). For state action to be shown, the conduct in question "must be caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible" and "the party charged with the [conduct] must be a person who may fairly be said to be a state actor". *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982) The conduct of the Election Officer and Independent Administrator was not state generated, neither can they be said to be state actors. *United States v. IBT*, 941 F.2d 1292, 1295 (Senese) (2d Cir. 1991), *cert. denied*, 60 U.S.L.W. 3219 (U.S. Oct. 7, 1991) (No. 90-1904).

appeal to the Independent Administrator who held a hearing in which Star Market participated and, thereafter, issued a written decision. Star Market was also heard by the District Court and provided an opportunity to appeal to the Court of Appeals. Due process—particularly under the constraints of time imposed by the Consent Decree and its inflexible election schedule—requires no more.

No denial of due process resulted from the failure to defer to the prior arbitration award. The decisions of this Court confirm that no deferral is appropriate when a labor related claim—although cognizable under a collectively bargained arbitration provision—also emanates from a separate source of legal rights, even if such separate source is but co-extensive with the rights afforded in the collective bargaining agreement. *McDonald v. City of West Branch,* 466 U.S. 284 (1984); *Barrentine v Arkansas Best Freight Systems, Inc.,* 450 U.S. 728 (1981); *Alexander v. Gardner-Denver Co.,* 415 U.S. 36 (1974).

Even if the Consent Decree—not being an act of Congress—does not provide the same overriding impact on arbitration decisions, no disruption has or will be foisted upon the body of federal labor law by the decision below, despite Petitioner's claims. The IBT election process was a unique and singular event, an event now concluded. Its genesis was the history of mob domination of the hierarchy of the IBT and the continual and heretofore futile efforts to remove such corrupting influence. The breadth of the election undertaking mandated by the Consent Decree is unlikely to ever be repeated in the annals of American labor unions. The Court of Appeal's decision of which review is sought is based and firmly grounded upon the historic but arduous tasks supervision of such election engendered, a situation unlikely ever to be repeated. No review of that decision is required.

CONCLUSION

Based on the foregoing arguments and in accord with the decisions below, the Election Officer respectfully requests the Petition for Writ of *Certiorari* be denied.

Respectfully submitted,

BARBARA J. HILLMAN
Counsel of Record
CORNFIELD AND FELDMAN
343 South Dearborn Street
Thirteenth Floor
Chicago, Illinois 60604
(1-312) 922-2800

Attorneys for Michael H. Holland, Election Officer